be adequately treated in this note, it is suggested that the telegraph business, like the railroad business, is one of increasing returns; that this is true until the maximum economic capacity of the wires is obtained; and that an arbitrary decrease, by reason of the inability of the corporation to carry on local business, of the total amount of business carried over each wire would seem inevitably to require a larger percentage of the fixed and operating expenses to each interstate message and therefore to an increased cost per message. This additional cost would roughly represent the burden imposed if the defendant corporation is deprived, by reason of the non-payment of the charter fee, of the right to carry on intrastate business.[19]

In view of the fact that the Supreme Court (the majority opinion) distinguished the present case from that of *Prewitt* v. *Ins. Co.*[20] on the ground that the defendant in the present case was engaged in interstate commerce, *quare*, does the intimation in the concurring opinion of Mr. Justice White indicate that in the case of a corporation engaged in interstate commerce a State cannot make the grant of the right to carry on intrastate business in connection therewith, defeasible upon the exercise by it of a right under the Federal Constitution. (Compare paragraph 4, *ante.*)

For the foregoing reasons, and without adopting the view of the dissenting judges that the present case marks a departure by the Court from its decision in *Insurance Company* v. *Prewitt*, but, rather, that that case is distinguishable from the present case, we must agree with the decision of the majority of the Court in the case now under discussion.

Liability of Water Company to Property Owner.

Is a water company, which has contracted with a municipality to supply water, liable to an individual property owner whose property is destroyed by fire as a result of the negligence of the company in supplying the water? The well-considered case of *German Alliance Insurance Company* v. *Home*

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[19] *Compare: Darnell & Son Co.* v. *Memphis*, 208 U. S. 113; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. (A State may not in the exercise of is taxing power discriminate against interstate commerce.)

[20] 202 U. S. 246 (1906).

Water Supply Company[1] denies such liability either in contract or in tort. This case is undoubtedly supported by the great weight of authority, and seems to be absolutely sound. Let us consider first the liability in contract.

In the first place, it is settled that if the municipality itself undertakes to supply water to its citizens, it is not liable for negligence in the performance of the work.[2] The power to establish water works is regarded as a governmental function, entrusted by the State to the municipality as its agent. Following out this idea, it has been held that when the municipality contracts with a private company for its water supply, it constitutes the company its agent, and since the act of the agent is the act of the principal, and in doing the act no higher duty can rest on the agent than would have rested on the principal, the property owner cannot recover from the company because it could not have recovered from the municipality.[3] This theory, however, seems unsound. There can be no recovery from the municipality because, as sovereign, in the performance of a governmental function, it is exempt from all liability; but this exemption certainly cannot be delegated to a private company.

When the contract is made by the city with the water company, *prima facie* the individual citizen has no rights under it, because of lack of privity; and in the earliest cases on the question in this country, recovery was refused on this ground alone.[4] But it was soon recognized that one not a party to a contract might recover on it if he was the sole beneficiary, and the real question is whether the property owner in the contract under discussion comes within this rule.

The case of *Vrooman* v. *Turner*[5] is a leading case on the right of a beneficiary to sue. It is there held that there are two essentials to such right: (1) there must be an intention on the part of the promisee to secure some benefit to the third party; (2) there must be some privity between the promisee and the third party which would give the latter a legal or equitable claim to the benefit of the promise. There is considerable conflict as to whether the second point is really necessary, and the

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[1] 174 Fed. 764.

[2] U. S. 1. *Sault Ste. Marie,* 137 Fed. 258; *Springfield Ins. Co.* v. *Keeseville,* 148 N. Y. 46.

[3] *Thompson* v. *Water Co.,* 215 Pa. 275; *Nichol* v. *Water Co.,* 53 W. Va. 348

[4] *Nickerson* v. *Water Co.,* 46 Conn. 24; *Foster* v. *Water Co.,* 3 Fed. (Tenn.) 42.

[5] 69 N. Y. 280.

majority of the cases apparently do not require it. Those jurisdictions which do recognize it would of course deny the right of the property owner to recover from the water company, because there is no such privity between the owner and the municipality.[6]

But the first essential is universally recognized. Applying it, the majority of the cases hold that there is no such intention to benefit the individual citizen—that the benefit to him is indirect.[7] Directly *contra* to this are the decisions in North Carolina, Kentucky and Florida. In these jurisdictions the water company is held liable, on the ground that the people are the sole beneficiaries under the contract; that they are taxed to pay the consideration for the contract; and that one of a class of beneficiaries can sue if the class is sufficiently designated.[8]

But the view that the benefit is indirect seems more correct. The water company undertakes to supply water to the municipality, and the municipality itself applies the water for the benefit of the public by means of its fire department. As is said in our principal case, the mere supply of water would be of little avail. Farnham, in his work on waters,[6] considers unsound the theory of recovery by the property owner as the beneficiary, but asserts that he should be allowed to recover upon the ground that the municipality acts as his agent in making the contract with the water company.[9] This, however, is answered in the principal case, where Osborne, J., says: "The city may in a sense be the agent of the citizens in the aggregate, but not separately and individually."

One citizen could not sue on such a contract any more than one of a hundred joint principals could sue alone on a contract made by the common agent. On no ground, therefore, can recovery on the contract be allowed.

It is equally difficult to establish liability in tort. To hold the company liable, there must be a breach of a duty owed to the individual citizen, and here there is no relation whatever between the company and the citizen. The city is under no duty to the public to establish water works, and the water

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[6] *Howsman* v. *Water Co.*, 23 L. R. A. 146 (Mo.); *Becker* v. *Water Works Co.*, 79 Iowa 419; *Ferris* v. *Water Co.*, 16 Nev. 44.

[7] *Akron Water Co.* v. *Brownless*, 10 Ohio C. C. 620; *House* v. *Water Co.*, 88 Tex. 233; *Bush* v. *Water Co.*, 43 Pac. 69 (Idaho); *Eaton* v. *Water Co.*, 37 Neb. 546; *Wainwright* v. *Water Co.*, 78 Hun, (N. Y.) 146; see also principal case.

[8] *Gorrel* v. *Water Co.*, 124 N. C. 328; *Water Co.* v. *Tigon*, 112 Ky. 775; *Paducah Timber Co.* v. *Water Co.*, 89 Ky. 340; *Mugge* v. *Water Works*, 52 Fla. 371.

[9] *Farnham, Waters*, pp. 842-851.

company assumes none by the contract with the city. There must first be a contract relation with the taxpayer before he can sue in tort.[10] It has been held that the company assumes a public duty by undertaking to supply the water; that the people, relying upon the contract, neglect to provide for other sources of supply.[11] But this is certainly unsound. The mere fact that A relies upon the performance of a contract made by B with C does not establish any duty on the part of C to A to exercise care in the performance of the contract.

The sound and logical result would seem to be that the water company is not liable to the property owner either in tort or in contract. This result may not be satisfactory, and may well be an appropriate subject for change by the Legislature; because, as Judge Freeman points out in a note to *Britton* v. *Water Works Co.*,[12] if the contract is not made for the benefit of the taxpayer in such a sense that he can sue upon it, it is not made for his benefit in such a sense that the city can recover damages in his name. Loss by fire in such case would therefore be *damnum absque injuria*, and for the protection of the people a change might well be made.

R. C. H.

Extra-Territorial Effect of Legitimation.

The recent affirmance by the United States Supreme Court of the judgment of the New York Court of Appeals in the case of *Olmsted* v. *Olmsted*[1] raises again the interesting question of the extra-territorial effect of a legitimation by a subsequent marriage. The facts in this case were briefly as follows: Real estate situated in New York was left to Benjamin F. Olmsted for life, with remainder to his lawful children. After having four legitimate children in New York, he deserted his wife, and, without an attempt to obtain a divorce, went through a form of marriage in New Jersey with another woman, by whom he had two illegitimate children. He then became domiciled in Michigan, where he procured a decree of divorce from his first wife, who still resided in New York, on the ground of

[10] See, denying *tort* liability, *Britton* v. *Water Co.*, 81 Wis. 48; *Fowler* v. *Athens*, 83 Ga. 219; *House* v. *Water Co.*, 88 Tex. 233; *Nichol* v. *Water Co.*, 53 W. Va. 348; *Fitch* v. *Water Co.*, 139 Ind. 214.

[11] *Mugge* v. *Water Works*, 52 Fla. 371; see also *Guardian Trust Co.* v. *Fisher*, 200 U. S. 69.

[12] 29 Am. St. Rep. 863.

[1] 30 Sup. Ct. Rep. 292, 1910; 190 N. Y. 458, 1908.